Supreme Court, U.S.
FILED
JAN 9 2001
CLERK

(4)

No. 00-499

IN THE

Supreme Court of the United States

KEVIN THOMAS AND JOYCE BAKER,

Petitioners,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. THE NINTH CIRCUIT'S EN BANC DECISION DEFIES PRINCIPLES OF ARTICLE III LAW ESTABLISHED BY THIS COURT'S CONTROLLING PRECEDENT 1

II. THE NINTH CIRCUIT'S EN BANC DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING PRINCIPLES OF ARTICLE III LAW 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page**

ACLU v. Johnson,
194 F.3d 1149 (10th Cir. 1999) 9

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 3, 5, 7, 8

Babbitt v. United Farm Workers Nat'l Union
442 U.S. 289 (1979) 2, 4, 5, 6

Doe v. Beaumont Ind. Sch. Dist.,
173 F.3d 274 (5th Cir. 1999) 9

Doe v. Bolton,
410 U.S. 179 (1973) 2, 3, 4, 6

EPA v. National Crushed Stone Ass'n,
449 U.S. 64 (1980) 3

Epperson v. Arkansas,
393 U.S. 97 (1968) 3, 4, 5, 6

FEC v. Akins,
524 U.S. 11 (1998) 7

Foreman v. Anchorage Equal Rights Comm'n,
779 P.2d 1199 (Alaska 1989) 1

Gardner v. Toilet Goods Ass'n, Inc.,
387 U.S. 167 (1967) 3, 7

Hays v. City of Urbana,
104 F.3d 102 (7th Cir. 1997) 9

Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union v. Thomas,
551 P.2d 942 (Alaska 1976) 1, 5, 7

Minnesota Citizens Concerned for Life v. FEC,
113 F.3d 129 (8th Cir. 1997) 10

National Rifle Ass'n of America v. MaGaw,
132 F.3d 272 (6th Cir. 1997) 10

Navegar, Inc. v. United States,
103 F.3d 994 (D.C. Cir. 1997) 9

North Carolina Right to Life, Inc. v. Bartlett,
168 F.3d 705 (4th Cir. 1999) 9

Nutritional Hlt. All. v. Shalala,
144 F.3d 220 (2nd Cir. 1998) 9

Pacific Gas and Electric Co. v. State Energy Resources Conservation and Dev. Comm'n,
461 U.S. 190 (1983) 3

Poe v. Ullman,
367 U.S. 497 (1961) 3, 4, 5

Presbytery of New Jersey v. Florio,
40 F.3d 1454 (3rd Cir. 1994) 9, 10

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 8

Reno v. Catholic Social Services,
509 U.S. 43 (1993) 3, 4, 7, 8

Rhode Island Assoc. of Real., Inc. v. Whitehorse,
199 F.3d 26 (1st Cir. 1999) 9, 10

School District of Abington Township v. Schempp,
374 U.S. 203 (1963) 6

Swanner v. Anchorage Equal Rights Comm'n,
874 P.2d 274 (Alaska)
cert. denied 513 U.S. 979 (1994) 1, 8

Thomas v. Anchorage Equal Rights Comm'n,
220 F.3d 1134 (9th Cir. 2000) ..... *passim*

Virginia v. American Booksellers Ass'n,
484 U.S. 383 (1988) 2, 5, 6

Statutes and Other Authorities:

U.S. Const. amend I ..... *passim*

U.S. Const. art. III ..... *passim*

AS 18.80.100-.240 7

AMC 5.20.020 7

The Holy Bible 7

INTRODUCTION

This case presents important Article III questions of law in contexts of (1) the Ninth Circuit's defiance of this Court's precedent; and (2) multiple conflicts between the Ninth and other circuits regarding principles of law. Haley is mistaken in her notion that differing facts explain away the apparent conflicts.[1] The Ninth Circuit's aberrant en banc decision in this case is not absolved by the factual nuances of Article III standing and ripeness. The decision below machinates definite conflicts in principles of Article III law between the Ninth Circuit, this Court, and other federal courts of appeal. This Court should address and resolve those conflicting Article III principles of law in the context of this important First Amendment case.

ARGUMENT

I. THE NINTH CIRCUIT'S EN BANC DECISION DEFIES PRINCIPLES OF ARTICLE III LAW

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[1]There is not one disputed fact in this case regarding Thomas' and Baker's (a) sincere religious beliefs regarding marriage, cohabitation, facilitation of sin, and honoring their government by obeying the law; (b) property ownership; (c) business policies and practices to offer their rental units for let by excluding unmarried *cohabiting* couples as potential tenants; or (d) past and present violations of the anti-discrimination laws. (App. 165a-169a, 171a-176a) There are no disputed facts in this case regarding the government's (a) statutory and judicial mandate to enforce the proscriptive laws (*Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union v. Thomas*, 551 P.2d 942, 945 (Alaska 1976)); (b) past and present enforcement of the laws against identical landlords (*Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); Appendix G); and (c) actual verbal threat to enforce the laws against identical landlords. (App. 187a)

ESTABLISHED BY THIS COURT'S CONTROLLING PRECEDENT

The Ninth Circuit's decision cannot be justified by Haley's supposed factual distinctions. This Court's decisions establish concrete principles of Article III law which the Ninth Circuit defied in *Thomas*.[2] First, the Ninth Circuit defied this Court's rule that a pre-enforcement First Amendment challenge to a prospective law carrying legal penalty for violation is justiciable if it is brought by a plaintiff who is or will be squarely subject to the laws proscriptions, at least absent an express government disclaimer of an intent to enforce. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 386-393 (1988);[3] *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-301 (1979);[4] *Doe v. Bolton*, 410 U.S. 102, 140

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[2]*Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1143-1151(9th Cir. 2000) (en banc) ("O'Scannlain, J. concurring; Kleinfeld, J., dissenting).

[3]In *Booksellers* the plaintiffs maintained a challenge despite the fact that the law had never become effective, despite the fact that the plaintiffs had never violated the law or even yet taken action in response to it, and despite the fact that it was uncertain when in the future the plaintiffs might ever take action or be charged. The Court allowed the suit to proceed because the law was proscriptive, carried legal penalty, by its existence threatened prospectively to "chill" First Amendment rights, and because the government would not disclaim an intent to enforce the law in the future. 484 U.S. at 388-393.

[4]In *Babbitt*, the plaintiffs were allowed to challenge the law's union election procedures despite their failure to invoke, and their disclaimer of an intent to invoke, election procedures simply because (a) the law worked a present harm to their associational right to organize (they were dissuaded from holding elections because of the law's onerous procedures); and (b) they faced potential future harm to be incurred in the event of an election (which they had no intention of holding). 442 U.S. at 299-301 and n. 12.

(1973);[5] *Epperson v. Arkansas*, 393 U.S. 97, 102 (1968);[6] *Reno v. Catholic Social Services*, 509 U.S. 43, 57 (1993). As the Court stated in *Reno:* "[i]n some cases, the promulgation of a regulation will itself affect parties concretely enough to satisfy" the ripeness component of justiciability. *See also Pacific Gas & Elec. Co. v. State Energy Res. Cons. and Dev. Comm'n*, 461 U.S. 190, 200-202 (1983);[7] *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n. 12 (1980);[8] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 152-153 (1967); *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171-172 (1967).

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[5]The plaintiff doctors in *Bolton* challenged a law which in its five year existence had never been enforced or threatened against anyone. 410 U.S. at 185-189.

[6]In *Epperson*, which was decided after *Poe v. Ullman*, 367 U.S. 497 (1961), a teacher challenged a law which had never been enforced or threatened against anyone in any manner, civil or criminal, in its entire forty (40) year existence, and despite this Court's express acknowledgment that the law was "more of a curiosity than a vital fact of life." 393 U.S. at 100-102. According to this Court's express ruling in *Epperson*, it was the Court's "duty to decide the issues presented" by the proscriptive law which by its terms *alone* and not by its application or enforcement, affected First Amendment rights. *Id.* at 102. The primary thing that was "patent" and "inevitable" in *Epperson*, was that the law in question would never be placed in "operation." See *Reno*, 509 U.S. at 69 (O'Connor, J., concurring).

[7]In *Pacific* this "Court permitted utilities to challenge a state law imposing a moratorium on the certification of nuclear power plants, even though the utilities had not yet applied for a certificate." *Reno*, 509 U.S. at 69 (O'Connor, J., concurring) *citing Pacific*, 461 U.S. at 200-202.

[8]In *National Crushed Stone*, "the Court held that a facial challenge to the variance provision of an EPA pollution-control regulation was ripe even 'prior to application of the regulation to a particular [company's] request for a variance.'" *Reno*, 509 U.S. at 69 (O'Connor, J., concurring) *quoting National Crushed Stone*, 449 U.S. at 72 n. 12.

Where a law is proscriptive in nature and creates a "duty" which the plaintiff must obey subject to legal penalty, the plaintiff's pre-enforcement claim is justiciable "[w]here the inevitability of the operation of a statute against certain individuals [the plaintiff] is patent." *Reno*, 509 U.S. at 57; *Id.* at 68-69 (O'Connor, J., concurring). As Justice O'Connor explained in her *Reno* concurrence:

> "[I]t is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."... If it is "inevitable" that the challenged rule will "operat[e]" to the plaintiff's disadvantage . . . then there may well be a justiciable controversy that the court may find prudent to resolve.

509 U.S. at 69 (O'Connor, J., concurring).

In stark contrast to this Court's rulings, the Ninth Circuit declared that "the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy'" requirement ... there must be a 'genuine threat of *imminent* prosecution.'" *Thomas*, 220 F.3d at 1139 (emphasis added). While as a generic statement this assertion is arguably consistent with *Poe*, 367 U.S. at 501-502 (in the context of an antiquated law which is clearly in desuetude such as the Connecticut contraceptive laws which had been in effect for close to a century and not enforced for decades despite widespread violation), it cannot be squared with *Booksellers*, *Babbitt*, *Bolton*, *or Epperson*. In fact, based upon this Court's Article III ruling in *Epperson*, it is debatable whether *Poe*,

which the Ninth Circuit appears to have relied upon heavily,[9] remains good law. *Epperson* appears to have overruled *Poe*.[10]

Second, the Ninth Circuit defied this Court's rule that a plaintiff may mount a pre-enforcement challenge to a law which threatens prospectively to "chill" the exercise of First Amendment rights regardless of any threat of "imminent prosecution,"[11] at least absent a government disclaimer of an intent to enforce. *Booksellers*, 484 U.S. at 393; *Babbitt*, 442 U.S. at 299-301 and n. 12; *accord Epperson*, 393 U.S. at 102.[12] Haley is mistaken in her thought that the "chilling" effect of a law is evaluated retrospectively under Article III. (*Haley*, 10–11) The question is not whether the law in retrospect caused the plaintiff to change her constitutionally protected conduct, but instead whether the law threatens prospectively to

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[9]*See, e.g., Thomas*, 220 F.3d at 1140-1141.

[10]The Ninth Circuit manufactured irrelevant factual questions (*Thomas*, 220 F.3d at 1142 and n. 8, 1144 n. 1, 1149) in order to disregard this Court's rule that prudential ripeness concerns do not exist in a case which presents pure questions of law. *Abbott*, 387 U.S. at 148-153. As Haley's Opposition confirms, there are no genuine issues of material fact in this case and this case strictly involves the application of law to uncontested facts. It makes no difference who the unmarried tenants are that Thomas and Baker have turned away in the past or what their circumstances were, the landlords operate under business policies which decline rental to all unmarried *cohabitants*. The pure question of law at stake herein is whether the landlords are constitutionally entitled to a religious exemption from laws which mandate such rental.

[11]*Thomas*, 220 F.3d at 1139.

[12]In this case, Haley is powerless to give such a disclaimer (*Hotel, Motel*, 551 P.2d at 945), and at oral argument before the Ninth Circuit en banc panel in March, 2000 Respondents *refused* to give such a disclaimer in response to Justice O'Scannlain's direct question.

pressure her (and others) to refrain from constitutionally protected conduct.[13] Under Haley's version of "chilling," only weak-kneed individuals would be able to justiciably challenge a proscriptive law, while the devout and steadfast would be denied their day in federal court.[14]

Third, the Ninth Circuit ignored this Court's rule that present harm to a plaintiff, either in the exercise of her constitutional rights or economically, sustains the justiciability of her claim against a proscriptive law causing the injury regardless of any threat of future enforcement.[15] By contrast the Ninth Circuit ruled that a proscriptive law with legal penalty cannot create a "constitutionally sufficient direct injury," but instead justiciability hinges exclusively upon a "threat of *imminent* prosecution." *Thomas*, 220 F.3d at 1139-

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[13] *Booksellers*, 484 U.S. at 393 (justiciability based upon the "chilling" effect of a law which had never yet become effective and thus had no retrospective operation against anyone).

[14] It requires little foresight to predict that government would challenge the "sincerity" of any religious adherent who abdicated her religious convictions in the face of a proscriptive law.

[15] *See Babbitt*, 442 U.S. at 298-301 (present harm to associational right to organize for election purposes with no threat of enforcement because there was no intent to hold elections); *Bolton*, 410 U.S. at 185 (present harm to associational rights and occupational liberty with no enforcement or threat in the law's five year existence); *Epperson*, 393 U.S. at 100-102 (present harm to associational and speech rights with no enforcement or threat in the law's forty (40) year existence); *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 and n. 9 (1963) (present religious injury suffices in free exercise context). Article III ripeness requirements are not diluted in Establishment Clause cases. *Id.* (while injury need not be religious, plaintiff must be "directly affected by the laws" to bring federal challenge).

1140 (emphasis added). According to the Ninth Circuit, government can civilly enforce with impunity and simply refrain from *criminal* enforcement, thereby immunizing its constitutionally suspect law from federal review.[16]

Fourth, the Ninth Circuit ignored this Court's rule that a mere possibility that government might exercise its discretion to withhold future enforcement, or might exercise its discretion to limit future enforcement to civil action, does not defeat the justiciability of a pre-enforcement challenge.[17] Ignoring Haley's lack of discretion based upon her statutory and judicial mandate to enforce the laws,[18] the Ninth Circuit ruled that a

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[16]By this Court's precedent, when the impact of a law is presently realized by the plaintiff in his or her every-day affairs, presenting the plaintiff with the dilemma of choosing between compliance or legal penalty, justiciability exists for a pre-enforcement challenge. *Reno*, 509 U.S. at 57-58 *citing Gardner*, 387 U.S. at 171-172; *Abbott*, 387 U.S. at 152-153. By contrast, the Ninth Circuit en banc panel scoffingly ignored the immediate effect of the laws on Thomas and Baker, causing them present religious harm, by (a) proscribing their business policies of "offering" units for let in discrimination against unmarried cohabitors (plaintiffs' daily conduct is proscribed by AS 18.80.240; AMC 05.20.020); (b) requiring them to violate their religious beliefs under Romans 13 regarding honoring their government and its laws on a daily basis as they "offer" units for let in discrimination against unmarried cohabitors and periodically as they turn away unmarried couples; and (c) proscribing their religiously motivated speech regarding marriage and cohabitation. AS 18.80.240(3); AMC 05.20.020(C). *See Thomas*, 220 F.3d at 1139.

[17]*See FEC v. Aikens*, 524 U.S. 11, 25 (1998) (justiciability despite the possibility that the FEC might have exercised its discretion in the future to decline prosecution); *Abbott*, 387 U.S. at 154 (justiciability despite the government's claim that the most it *might* do at some uncertain date in the future was pursue *civil* enforcement).

[18]*Hotel, Motel*, 551 P.2d at 945.

general threat of future civil enforcement did not support justiciability. *Thomas*, 220 F.3d at 1139-1141.[19]

Fifth, according to *Abbott* the government's expenditure of considerable effort and money *defending* a law from *civil* constitutional challenge demonstrates a reasonable threat of future enforcement because it demonstrates government's determination to see the law preserved in operation. 387 U.S. at 154 ("the Justice Department is defending this very suit"). In derogation of this decision, the Ninth Circuit ignored Alaska's and Anchorage's expenditure of eleven years of manpower and hundreds of thousands of dollars in public monies defending these laws from constitutional challenge.[20]

II. THE NINTH CIRCUIT'S EN BANC DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING PRINCIPLES OF ARTICLE III LAW

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[19]This Court has ruled that a mere time delay before future enforcement will ensue against a plaintiff who is squarely subject to a proscriptive law, does not defeat justiciability. *Reno*, 509 U.S. at 68 *quoting Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974). By contrast, the Ninth Circuit ignored the inevitability that Thomas and Baker, landlords with undisputed rental policies and practices proscribed by these laws, will eventually fall into the government's *statutorily and judicially mandated* enforcement "sights" in the future, and ruled that a threat of prosecution must be "imminent," regardless of present harm. 220 F.3d at 1139.

[20]*Swanner* started in 1989 and ended in 1994 and *Thomas* followed in 1995 and continues. The government's determination to preserve these laws in operation is patent. It is disingenuous for Haley to suggest and absurd for the Ninth Circuit to conclude that Alaska and Anchorage would squander enormous public manpower and monies in order to preserve dead letter laws of no import or effect.

The conflict between the Ninth Circuit and other federal courts of appeal created by *Thomas* relates to principles of Article III law not factual nuances. Unlike the Ninth Circuit, other circuits rule that a proscriptive law with legal penalty is sufficient to confer justiciability upon a claim brought by a plaintiff subject to the law, regardless of any threat of prosecution (let alone "imminent" prosecution). *See Rhode Island Assoc. of Real., Inc. v. Whitehorse*, 199 F.3d 26, 28 (1st Cir. 1999); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709-711 (4th Cir. 1999); *Navegar, Inc. v. United States*, 103 F.3d 994, 999-1001 (D.C. Cir. 1997). *Contra* 220 F.3d at 1139.

Unlike the Ninth Circuit, other circuits rule that the prospective chilling of constitutional rights sustains justiciability regardless of any threat of prosecution (let alone "imminent" prosecution). *See Nutritional Hlt. All. v. Shalala*, 144 F.3d 220, 226-227 (2nd Cir. 1998); *ACLU v. Johnson*, 194 F.3d 1149, 1153-1155 (10th Cir. 1999). *Contra* 220 F.3d at 1139. Unlike the Ninth Circuit, other circuits rule that the inability to predict when a violation of the law or an enforcement might occur is not an obstacle to justiciability. *See Presbytery of New Jersey v. Florio*, 40 F.3d 1454, 1458-1464 (3rd Cir. 1994); *Doe v. Beaumont*, 173 F.3d 274, 280-284 (5th Cir. 1999); *Hays v. City of Urbana*, 104 F.3d 102, 103-104 (7th Cir. 1997).[21] *Contra* 220 F.3d at 1139-1140.

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[21]The Seventh Circuit's decision in *Hays* is likely the most direct conflict with *Thomas*. In *Hays* the Seventh Circuit rejected the government's claim that it was too speculative to believe that the plaintiff would ever be subject to the law at issue because the government stated that it would not enforce until it received evidence of some future violation (by way of citizen complaint) on some uncertain future date. 104 F.3d at 103-104. *Compare Thomas*, 220 F.3d at 1139-1140.

Unlike the Ninth Circuit, the First and Third Circuits have held that a government refusal to disclaim an intent to enforce sustains justiciability, regardless of any evidence of any prosecution at any time. *Whitehorse*, 199 F.3d at 28 (justiciability to challenge 20 year old law which had never been enforced); *Presbytery*, 40 F.3d at 1458-1464 (no evidence of when, if at all, clergyman might violate ordinance). *Contra* 220 F.3d at 1140-1141. Unlike the Ninth Circuit, the Sixth Circuit rules that present harm caused by a proscriptive law sustains justiciability, regardless of any threat of prosecution (let alone "imminent" prosecution). *National Rifle Ass'n of America v. MaGaw*, 132 F.3d 272, 282-288 (6th Cir. 1997). *Contra* 220 F.3d at 1139. Finally, unlike the Ninth Circuit, the Eighth Circuit rules that criminal action is not necessary to demonstrate a threat of enforcement, and even a government's civil defense of a law shows an intent to enforce. *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130-131 (8th Cir. 1997). *Contra* 220 F.3d at 1140-1141.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: January 9, 2001